

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

In RE:

DOVER POLICE DEPARTMENT : Representation Petition
LIEUTENANTS :
AND FOP LODGE NO. 15 : No. 98-08-242

Appearances

Perry F. Goldlust, Esq. Heiman, Aber, Goldlust & Baker., for FOP Lodge 15
William W. Pepper, Sr., Esq., Schmittinger & Rodriguez, P.A., for Dover

BACKGROUND

The City of Dover, Delaware, (“City”) is a public employer within the meaning of §1602(l) of the Police Officers’ and Firefighters’ Employment Relations Act, 19 Del.C. Chapter 16 (1986, “POFERA”).

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All of the officers of the Dover Police Department are public employees within the meaning of 19 Del.C. §1602(k). Fraternal Order of Police Lodge No. 15 (“FOP”) is an employee organization within the meaning of 19 Del.C. §1602(f).

On July 22, 1992, the Public Employment Relations Board (“PERB”) certified Fraternal Order of Police Lodge 3 as the exclusive bargaining representative of the bargaining unit of “all sworn police officers employed by the Dover Police Department in the ranks of Patrolman, Patrolman First Class, Corporal and Sergeant.” PERB Rep. Pet. 92-06-074. At some point prior to the June 13, 1994, signing of the 7/1/94 – 6/30/97 collective bargaining agreement, the Lodge designation was changed to FOP Lodge 15.

¹ In October, 1991, the Dover City Council opted through an affirmative legislative act to be covered by the provisions of the POFERA, as required by 19 Del.C. §1602(l).

At all times relevant to this matter, FOP Lodge No. 15 has and continues to be the exclusive bargaining representative of this bargaining unit, within the meaning of 19 Del.C. §1602(g). The City of Dover and FOP Lodge No. 15 are parties to a current collective bargaining agreement with a term of 7/1/97 – 6/30/00.

On or about August 19, 1998, FOP Lodge 15 filed a petition seeking to modify the existing bargaining unit of Dover Police employees to include the five Lieutenants. The Petition was accompanied by authorization cards representing more than thirty percent (30%) of the Lieutenants.

By letter dated September 3, 1998, the City opposed the proposed modification of the bargaining unit.

Two days of hearing were held on October 19 and November 5, 1998. The parties filed responsive post-hearing argument, with the final brief received on January 11, 1999.

The following decision results from the record created by the parties.

ISSUES

1. Whether the petition which seeks to modify the existing bargaining unit of City of Dover Police Officers currently represented by FOP Lodge No. 15 is properly filed, pursuant to the requirements of Rule 3.4(8) of the PERB's Rules and Regulations?
2. If so, are Lieutenants appropriate, within the meaning of 19 Del.C. §1610(d), for inclusion in the bargaining unit with police officers below the rank of Lieutenant?

OPINION

- I. Whether the petition which seeks to modify the existing bargaining unit of City of Dover Police Officers currently represented by FOP Lodge No. 15 is properly filed, pursuant to the requirements of Rule 3.4(8) of the PERB's Rules and Regulations?*

The Rules and Regulations of the Delaware Public Employment Relations Board concerning modification of an existing bargaining unit provide:

3.4(8) Modification of a Bargaining Unit: In the event there is a substantial modification in the nature of the duties and working conditions of a position within the bargaining unit, or a new position is created which is not covered by the existing bargaining unit definition, or there is some other compelling reason for the Board to consider modifying the bargaining unit, the public employer and/or the exclusive bargaining representative may file a petition with the Board which shall include the following:

- (a) The name of the employer;
- (b) The name of the exclusive representative;
- (c) A description of the bargaining unit;
- (d) A brief statement explaining the reasons for a modification of the bargaining unit.

The City moves this petition be dismissed because it fails to conform to the requirements of PERB Regulation 3.4(8). Specifically, the City argues Lieutenants have been employed by the City of Dover, performing essentially the same functions, since well before the bargaining unit was created pursuant to 19 Del.C. Chapter 16 in 1992. It asserts there is no compelling reason for modifying the bargaining unit within the meaning of the statute or PERB rules.

PERB interpreted and applied Rule 3.4(8) in a similar case involving the Battalion Chiefs of the City of Wilmington Fire Department in 1995, wherein it held:

... PERB has entertained representation petitions filed by unrepresented employees seeking to be represented through inclusion within an existing bargaining unit. The PERB has required a showing of interest by at least thirty percent (30%) of the unrepresented employees and an indication by the exclusive representative of the bargaining unit that it is willing to represent the employees/positions in question. Notices of the petition are posted at the PERB's direction in the workplace to notify all affected employees of the proposed change to the unit. If it is determined that the position(s) in question are appropriate for inclusion in the existing unit, a secret ballot election is held among the unrepresented employees to determine whether a majority of these employees desires to be represented, consistent with their statutory right to choose their representative, if any. If the vote fails, the positions in question do not become part of the bargaining unit and the employees in those positions remain unrepresented consistent with the desires of the majority.

PERB Regulation 3.4(8) has been applied in circumstances where the employer and/or the exclusive representative of an existing unit seek to change the unit definition, through the addition or deletion of positions or general classifications of positions. A modification under Regulation 3.4(8) is precipitated by one of three circumstances; 1) there is a significant change in the duties and working conditions of "a position within the bargaining unit", 2) a new position is created, or 3) there is some other compelling reason for the PERB to consider modifying the designated unit. Permitting only the employer and the exclusive representative to file modification petitions is consistent with the transfer of rights which occurs once employees have chosen to be represented. Regulation 3.4(8) does not apply,

however, to a petition filed by an unrepresented group of employees seeking representation, even where the employees desire to be represented within an existing unit. It is the right of unrepresented employees to choose their representatives.

The fact that a group of unrepresented employees have filed a proper petition seeking representation, consistent with their statutory rights, is sufficient to cause the PERB to consider the appropriateness of their inclusion in the desired bargaining unit. *In RE: Battalion Chiefs of the City of Wilmington Fire Department, Del. PERB, Rep. Pet. 95-06-142 (1995, III PERB Binder 1253).*²

As in that case, this petition involves a group of unrepresented employees who are seeking to be represented for purposes of collective bargaining within an existing unit. Consistent with the holding in Wilmington Fire Dept. Battalion Chiefs, this petition meets the requirements of PERB Regulation 3.4(8) in that there is a compelling reason for the PERB to consider a petition where public employees seek to exercise their statutory right to choose to be represented.

II. *Are Lieutenants appropriate, within the meaning of 19 Del.C. §1610(d), for inclusion in the bargaining unit with police officers below the rank of Lieutenant?*

The factors to be considered in reaching a determination as to appropriateness of a proposed bargaining unit are set forth in 19 Del.C. §1610(d):

d) In making its determination as to the appropriate bargaining unit, the Board or its designee shall consider such factors as the similarity of duties, skills, and working conditions of the employees involved; the history and extent of the employee organization; the recommendations of the parties involved; the effect of overfragmentation of bargaining units on the efficient administration of government; and such other factors as the Board may deem appropriate.

A determination as to appropriateness must be tailored to the unique facts and circumstances presented by the parties in each case. *In RE: Kent County Vo-Tech Special Education Instructional Aides*, Del. PERB, Rep. Pet. 91-06-065 (1992, I PERB Binder 743). The statute does not require that all members of a bargaining unit perform identical functions. *In RE: Caesar Rodney School District Instructional Aides*, Del. PERB, Rep. Pet. 92-03-070 (II PERB Binder 829 (1992)). All bargaining unit positions must,

² Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982, 1989) and/or the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994), are controlling to the extent that

however, share a community of interest premised upon a similarity of duties, skills and working conditions.

The Police Officers and Firefighters' Employment Relations Act grants to police officers and firefighters the rights of organization and representation. The PERB has broadly construed employee representation as a fundamental statutory right of employees. Del. Public Employees Council 81, AFSCME, AFL-CIO, Local 439 v. University of Delaware, Del.PERB, Rep. Pet. 95-04-126 (1995). Positions which are not statutorily excluded from eligibility for representation can only be excluded from bargaining units where those positions do not share a community of interest based on the factors set forth in 19 Del.C. 1610(d). In RE: Rehoboth Police Dept. and IBT Local 326, Del.PERB, Rep. Pet. 96-10-198 (III PERB Binder 1531 (1997)). PERB has held that, except for the most compelling reasons, eligible employees should not be denied access to the rights and protections created by the statute, including their right to chose to be represented. In RE: Internal Affairs Officer of Wilmington Fire Dept., Del.PERB, Rep. Pet. 95-06-142 (II PERB Binder 1387 (1996)).

The consideration of each of the statutory factors in this matter leads to the conclusion that Lieutenants of the Dover Police Department are appropriate for inclusion in the bargaining unit.

Similarities of Duties, Skills and Working Conditions:

Chief Faulkner testified Lieutenants are significantly different from bargaining unit officers because they are "staff officers" who have "crossed the bridge to management." The evidence, however, reveals the Lieutenants share many duties, skills and working conditions with Sergeants and even Corporals of the Dover Police Department, ranks which are both in the bargaining unit.³

There are five (5) Lieutenants employed by the Dover Police Department, all of whom testified during the hearing. Their testimony revealed, as Sergeants, most performed nearly identical functions to

the relevant portions of those statutes are identical to those of the Police Officers' and Firefighters' Employment Relations Act.

³ Ranks of the Dover Police force, in ascending order, are: Patrolman, Patrolman First Class, Corporal, Sergeant, Lieutenant, Captain, Major, and Chief.

those they now perform as Lieutenants. Like Sergeants, Lieutenants can approve overtime, plan and provide training to their subordinates, engage in planning functions, and discipline lower ranking officers. Corporals, Sergeants and Lieutenants have been involved in drafting policy memoranda for consideration by the Chief. They also issue directives concerning daily operational issues to their subordinates. All five Lieutenants have private offices in the police station, are generally scheduled to work a standard 8:00 a.m. to 4:00 p.m. shift, and have take home cars. The record establishes there are also several Sergeants and Corporals who serve in special duty positions who also enjoy these benefits.

Lieutenants serve no role in the contractual grievance and arbitration procedure. Corporals and Sergeants do participate in this process, hearing the Step 1 grievances of fellow bargaining unit members. There is no evidence of record this has caused a hardship to either the City or the officers.

Lieutenants do participate in the non-contractual grievance process established by General Order #25. Grievances under this order may relate to disciplinary actions, allegations of discrimination, and other issues which arise that are not based on the collective bargaining agreement. A grievance under this system is filed first with a platoon leader, who is generally a Sergeant (as set forth in General Order #11⁴). If these grievances are heard at Step 1 and Step 2 (the unit commander level) but not resolved, the grievant may chose to either process the grievance to the Chief of Police or to a Grievance Hearing Board, which is comprised of three staff officers chosen by the Chief. While the Chief testified he customarily appoints Lieutenants to serve on a Grievance Hearing Board, the Lieutenants testified grievances infrequently progress to this step.

A concern was also raised concerning the involvement of Lieutenants in Internal Affairs investigations of bargaining unit officers. It is undisputed that, until the last two or three years, the position of Internal Affairs Officer was held by a Sergeant. The current I.A. Officer, Lieutenant Weber, also held that position as a Sergeant. In his capacity as I.A. Officer he has had occasion to investigate both bargaining unit and non-bargaining unit officers. He testified neither his rank nor his position, either

within or without the bargaining unit, has interfered with his ability to fulfill his investigative or prosecutorial responsibilities. The Chief affirmed this testimony.

Lieutenants may also sit as members of a three officer Trial Board which reviews the evidence generated by the Internal Affairs Officer to determine whether the charges against an individual are supported by the record. Trial Boards serve a “fact-finding” function and do not assess discipline. Where the Trial Board finds the evidence sufficient to support the charge, the Chief of Police determines and assesses appropriate discipline. Although the Chief expressed his concern that Lieutenants may be subject to “conflict” if they become part of the bargaining unit, no evidence was produced to support the conclusion that representation within the bargaining unit would compromise these processes.

The process for promotion to the rank of Lieutenant was recently changed, such that new Lieutenants are appointed by the Chief and are no longer required to take a competitive examination. Until 1997, Lieutenants, like Sergeants and Corporals took oral and written examinations to compete for their positions. Examinations are still used, however, for promotion to the ranks of Corporal and Sergeant. General Order #34 requires the written and oral test questions be generated by a committee comprised of the Executive Officer, the Operations and Administration Divisions Commanders (both of whom are Captains according to the organizational chart attached to G.O. #34). Lieutenants do serve on the oral examination boards for candidates for Corporal and Sergeant. Composite scores on the oral examination constitute twenty percent (20%) of a candidate’s total score and are subject to appeal by a candidate. Lieutenants do not make final decisions as to which candidate is promoted, but rather administer one step in this process. The fact that Lieutenants may sit as part of a team reviewing candidates does not overcome the many other similarities they share with bargaining unit officers.

For all of these reasons, it is determined that Lieutenants do perform similar duties, work under similar conditions and must employ similar skills to Sergeants and other bargaining unit members.

⁴ City Exhibits 1 through #5 (job descriptions provided by the City at the opening of the hearing) were not relied upon in reaching this decision. General Order #11 provided information concerning the relative responsibilities of line officers in the Dover P.D. This provisions of this Order were corroborated by the testimony of the witnesses.

History and Extent of Organization:

Collective bargaining between the City of Dover and its police officers has occurred since at least 1977, albeit outside of the statutory framework until 1992. The FOP introduced into the record two agreements wherein the City recognized a bargaining unit of “all sworn police officers of the Dover Police Department with the exception of the Captains and the Chief of Police.”

It is undisputed the Lieutenants came out of this unit by agreement of the parties following the December 31, 1979, expiration of the second agreement. The record does not clearly indicate why this unit change occurred; however it is clear that no ruling was issued by the PERB or its predecessor, the Governor’s Council on Labor, as to the appropriateness of a bargaining unit which included Lieutenants.

Recommendations of the Parties:

The City and FOP Lodge 15 are opposed in their recommendations as to whether Lieutenants are appropriate for inclusion in the existing bargaining unit. For this reason, the recommendations of the parties have no direct impact of resolution of this issue.

Overfragmentation of Bargaining Units:

The efficient administration of municipal government dictates establishment of the fewest number of bargaining unit as is consistent with the statutory rights of public employees to organize and choose a representative for meaningful and effective representation. In RE: WFD Battalion Chiefs (Supra.).

Although the City has argued it would prefer to bargain with a separate unit of Lieutenants, the Lieutenants testified they do not believe their interests can be effectively represented in a small bargaining unit which is separate and distinct from the existing unit. There are currently three bargaining units of City of Dover employees: FOP Lodge 15 representing police officers below the rank of Lieutenant; IBT Local 1238 representing employees of the City of Dover Electric Department; and IUE

Local 315 representing a wide variety of employees in positions across city government, in pay grades which range from seven (7) through twenty-three (23).

Under these circumstances, a consideration of overfragmentation favors the Lieutenants and their request to be included within the existing unit. Creating a very small fourth unit does not further the efficient administration of government.

Other Factors:

The Police Officers and Firefighters Employment Relations Act does not define “supervisory employees” as the other two statutes administered by the PERB do. Neither does the POFERA require PERB to separate supervisory employees from those they supervise as the Public School Employment Relations Act does; nor does it exclude supervisory employees from eligibility for representation as does the Public Employment Relations Act. These statutory differences reflect an intent by the State Legislature to create different and distinct standards for the treatment of supervisory employees under the various statutes. Under the POFERA, there is no statutory presumption that supervisory employees are either inappropriate or ineligible for inclusion in any bargaining unit. Rehoboth Police Dept. (Supra.).

Furthermore, throughout Delaware police forces are widely organized for purposes of collective bargaining. The Delaware State Police bargaining unit includes all sworn officers except for the Lieutenant Colonel and the Colonel. New Castle County police officers up to and including the rank of Senior Lieutenant are included in one bargaining unit. The City of Wilmington officers are represented in two units: the larger unit includes all officers below the rank of Captain, while a much smaller second unit of Captains and Inspectors is represented by the same union. The City of Rehoboth has one bargaining unit of all officers at or below the rank of Sergeant; however, Rehoboth does not employ any officers in the rank of Lieutenant. All City of Newark police officers, except the Chief, are represented for purposes of collective bargaining.

Within this framework, including Lieutenants in the bargaining unit of Dover Police officers does not create a unique situation or violate the community standards.

DECISION

WHEREFORE, based on the circumstances presented by this petition, it is determined that Lieutenants are appropriate for inclusion in the existing bargaining unit. An election will be scheduled forthwith to determine whether Lieutenants desire to be represented as part of this unit by FOP Lodge 15 for purposes of collective bargaining.

IT IS SO ORDERED.

/s/ Deborah L. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD

Hearing Officer

Delaware Public Employment Relations Bd

DATED: March 25, 1999